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No. 99-3-567

In The Supreme Court of the United States

October Term, 1999

ERNEST GLENN AMBORT, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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January 18, 2000

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QUESTIONS PRESENTED FOR REVIEW

The questions presented are interrelated.

Should the Court of Appeals have exercised jurisdiction under the "collateral order" exception, allowing petitioners to present the First Amendment claim that they have a "right not to be tried"? *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-547 (1949); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982).

A. Does subjecting Petitioners to criminal sanction for challenging the IRS on a point of tax law using the means afforded under 26 U.S.C. § 7422, *Cheek v. United States*, 498 U.S. 192 (1991) and 26 C.F.R. § 301.6402, violate Petitioners' First Amendment rights and Fifth Amendment rights to Due Process? *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589, 596.

B. Do petitioners have a "right not to be tried" for an alleged violation of a tax law for having taught compliance with a lawful method for challenging the government's interpretation of the tax law? *Cheek v. United States*, 498 U.S. 192 (1991); 26 U.S.C. § 7422.

C. Is the United States applying 26 U.S.C. § 7206(2) in an overbroad and unconstitutional manner such that it causes irreparable injury, stifles expression and political debate, hedges up all access to the courts, and thereby penalizes petitioners for their exercise of First and Fifth Amendment rights? *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Younger v. Harris*, 401 U.S. 37, 53 (1971), *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589, 596.

PARTIES

The Petitioners are Ernest Glenn Ambort, John W. Benson, William J. Lewis and Steven W. Stay. The Respondent is the United States of America.

Nona S. Egbert and Merrill B. Hansen are parties in the District Court who did not participate in the appeal and are not participating in this Petition. Mr. Hansen entered a negotiated plea in the District Court and is awaiting the outcome of the underlying case to be sentenced.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES ii

CITATION OF OPINIONS 1

JURISDICTION 1

PERTINENT CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS 1

STATEMENT OF THE CASE 5

ARGUMENT WHY THE CASE SHOULD BE REVIEWED BY THE COURT 9

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

Abney v. United States, 431 U.S. 651 (1977) 9

Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984) 8

Bob Jones Univ. v. Simon, 416 U.S. 725 (1974) 16

Cheek v. United States, 498 U.S. 192 (1991) ..... i, 8, 14-15, 18

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) ..... i, 8-10

Commissioner v. Shapiro, 424 U.S. 614 (1976) 16

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 10, 12

Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994) 12

Dombrowski v. Pfister, 380 U.S. 479 (1965) ..... i, 8, 11, 14, 15, 19, 20

Greater New Orleans Broadcasting Association, Inc. v. United States, 527 U.S. 173 (1999) 16

Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989) 8

NAACP v. Button, 371 U.S. 415 (1963) 15-18, 22

Oestereich v. Selective Service Bd., 393 U.S. 233 (1968) 11, 19, 20

Phillips v. Commissioner of Internal Revenue, 283 U.S. 589(1931). ..... i, 14, 22

Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, L.Ed.2d 940 (1999) 11, 19, 20

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) 16

United States v. Ambort, et.al., 193 F.3d 1169 (10th Cir. 1999) 1, 20

United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982) ..... i, 8

United States v. MacDonald, 435 U.S. 850 (1978) 10

United States v. P.H.E., 965 F.2d 848 (10th Cir. 1992) . 20

Younger v. Harris, 401 U.S. 37 (1971) ..... i, 11, 20

Statutes

18 U.S.C. § 371 5

26 C.F.R. § 301.6402 ..... i, 13, 15

26 C.F.R. § 301.6402-1 3

26 C.F.R. § 301.6402-1(a)(1) 13

26 U.S.C. § 7206 . . . . . 2, 18, 22

26 U.S.C. § 7206(2) . . . . . i, 5, 15

26 U.S.C. § 7422 . . . . . i, 3, 4, 15, 17

28 U.S.C. § 1257 1

28 U.S.C. § 1291 . . . . . 8, 9

28 U.S.C. § 1346 5

Rules

Rule 4(b), Federal Rules of Appellate Procedure 1

CITATION OF OPINIONS

United States v. Ambort, et.al., 193 F.3d 1169 (10th Cir. 1999). (App., *infra*, 1B - 7B.) The Order of the District Court is unpublished. (App., *infra,* 1A - 2A.)

JURISDICTION

The District Court's Order was entered on the Docket March 15, 1999. The Notice of Appeal was filed March 24, 1999. See Rule 4(b), Federal Rules of Appellate Procedure ("within 10 days . . ."). The Tenth Circuit's Decision was filed October 19, 1999. Rehearing was denied on November 15, 1999. The Court's jurisdiction is pursuant to 28 U.S.C. § 1257.

PERTINENT CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

AMENDMENT I. UNITED STATES CONSTITUTION

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V. UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

26 U.S.C. § 7206. Fraud and false statements

Any person who -

· (2) Aid or assistance

Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a

corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

26 U.S.C. § 7422. Civil actions for refund

(a) No suit prior to filing claim for refund. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

26 C.F.R. § 301.6402-1

Abatements, Credits, and Refunds--Table of Contents

Sec. 301.6402-1 Authority to make credits or refunds. The Commissioner, within the applicable period of limitations, may credit any overpayment of tax, including interest thereon, against any outstanding liability for any tax (or for any interest, additional amount, addition to the tax, or assessable penalty) owed by the person making the overpayment and the balance, if any, shall be refunded, subject to sections

6402 (c) and (d) and the regulations thereunder, to that person by the Commissioner. [T.D. 8053, 50 FR 39662, Sept. 30, 1985]

(a) Requirement that claim be filed.

(1) Credits or refunds of overpayments may not be allowed or made after the expiration of the statutory period of limitation properly applicable unless, before the expiration of such period, a claim therefor has been filed by the taxpayer. Furthermore, under section 7422, a civil action for refund may not be instituted unless a claim has been filed within the properly applicable period of limitation.

* * *

(b) Grounds set forth in claim.

(1) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of such period. The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is made under

the penalties of perjury. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund or credit.

28 U.S.C. § Sec. 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

STATEMENT OF THE CASE

A grand jury indicted Defendants ("Petitioners" here) on one count of conspiracy to defraud the United States by assisting in the preparation of false tax returns, in violation of 18 U.S.C. § 371, and on sixty-nine counts of aiding and assisting in the filing of false tax returns, in violation of 26 U.S.C. § 7206(2). The conspiracy count alleges that Petitioners operated an organization that conducted constitutional history seminars throughout the United States, and that Petitioners falsely taught attendees that "nonresident

aliens," whose tax liabilities differed from those of U.S. citizens who derived their citizenship from the Fourteenth Amendment, were exempt from most federal income taxes. The false return counts allege that the Petitioners assisted in preparing tax returns that were false and fraudulent as to a material matter, specifically classifying the taxpayers as "nonresident aliens" when the taxpayers were in fact residents of the United States subject to the usual taxation and not entitled to the refunds claimed.

In pre-trial motions, the United States admitted that all factual information contained in the claims for refund and necessary to determine the tax already withheld or paid – names, dates, amounts and sources of income, social security numbers, and the like – was accurate. Nonetheless, the Indictment charges that the grounds for claiming refunds, namely, that (1) the Internal Revenue Code defined claimants as "nonresident aliens," (2) their fully disclosed incomes were largely not taxable, and (3) they therefore were entitled to a refund of taxes which they had previously paid or which had been withheld and paid over to the IRS, was defective. None of these three legal grounds was necessary for the IRS accurately to calculate the tax purported to be due and owing. Thus, based solely upon the United States' disagreement with the taxpayer's legal grounds, openly and honestly expressed, Petitioners were indicted.

Petitioners filed a Motion to Dismiss the Indictment. The United States argued both in its briefing and during oral

argument below that Petitioners risk the threat of a criminal prosecution if they challenge the IRS on a point of law pursuant to the mechanism provided in 26 U.S.C. § 7422 and *Cheek v. United States*, 498 U.S. 192 (1991). (App., *infra*, 18C.) Furthermore, and as also conceded by the government in oral argument below, there exists no other procedure whereby Petitioners, or other like-situated citizens, may adjudicate the viability of their grounds for a refund of taxes already paid without first claiming that refund in the exact same manner that led to Petitioners' prosecution. 26 U.S.C. § 7422. Petitioners believed that 26 U.S.C. § 7422 provided them the lawful procedure and that *Cheek v. United States*, 498 U.S. 192 (1991) provided them the lawful and constitutional principles justifying such a procedure as their gateway for the peaceful right to petition the courts for redress of grievances (to challenge the IRS on a point of law), and that the use of such lawful means must not subject them to the threat or reality of criminal prosecution when the government disagrees with the legal grounds asserted in a § 7422 claim. Otherwise, the First Amendment right to petition for redress of grievances is substantially chilled and the right to any judicial review and hearing of the asserted grounds is denied both pre- and post-deprivation. The District Court denied the Motion.

Petitioners appealed, asking the Tenth Circuit to exercise interlocutory jurisdiction, based upon the "right not to be tried," under the holding in *Dombrowski*. Petitioners argued that the Court's jurisdiction was pursuant to 28 U.S.C. §

1291 and, as follows: (1) the District Court's Order conclusively determined the disputed question of whether Petitioners have a right not to be tried; (2) the Order resolved the issue of whether Petitioners have a right not to be tried, which is an issue that is completely separate from the merits; and (3) the right not to be tried can be enjoyed only if vindicated before trial, and therefore the Order is effectively unreviewable on appeal after a final judgment. As an alternative, Petitioner Stay has asked this Court to exercise jurisdiction pursuant to the doctrine enunciated in *Bender v. Clark*, 744 F.2d 1424 (10th Cir. 1984), because of the important First and Fifth Amendment issues the prosecution of this case implicates. The Tenth Circuit reserved on the question of jurisdiction and instructed the parties to brief the underlying issues. In its decision filed October 19, 1999, a three-judge panel dismissed the appeal for lack of jurisdiction. The Court concluded that Petitioners' claim of a right not to be tried for the exercise of their First Amendment right to petition for redress of grievances did not satisfy the court's strict interpretation of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982) and *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989). The Tenth Circuit rejected the application of *Cheek v. United States*, 498 U.S. 192 (1991) to the facts of the case and concluded that Petitioners' First Amendment rights were "adequately protected by appeal after any adverse final judgment. (App., *infra*, 7B.)

The Tenth Circuit Court of Appeals erred in declining to exercise jurisdiction under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Petitioners have a right not to be tried for the exercise of their constitutional prerogatives under the First Amendment, which right is a substantial one that is separate from and collateral to the merits of the underlying case and which right cannot be vindicated on appeal.

ARGUMENT WHY THE CASE SHOULD BE REVIEWED BY THE COURT

This case presents three related and important constitutional issues erroneously decided by the Tenth Circuit.

The first issue is predicated on the principle that, although generally, under 28 U.S.C. § 1291, the courts of appeals have jurisdiction only over appeals from final judgments, this Court has recognized a limited exception for certain collateral orders that do not terminate an action. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). In *Abney v. United States,* 431 U.S. 651 (1977), this Court stated that non-final collateral orders are appealable if they meet three conditions: (1) The district court "had fully disposed of the question . . .; in no sense did it leave the matter 'open, unfinished, or inconclusive.'"; (2) "The decision was not simply a 'step toward final disposition of the merits of the case' . . .; rather, it resolved an issue

completely collateral to the cause of action asserted."; and (3) "The decision had involved an important right which would be 'lost, probably irreparably,' if review had to await final judgment. . . ." *Id.* at 658 (quoting *Cohen*, 337 U.S. at 546).

The second issue is predicated on this Court's determinations that the First Amendment affords scant protection unless it is understood to include "a right not to be tried." *United States v. Hollywood Motor Car Co., Inc.*, 458 U.S. 263, 267 (1982) (per curiam) (citing *United States v. MacDonald*, 435 U.S. 850, 860-61 (1978)). It is a right "which must be upheld prior to trial if it is to be enjoyed at all," *Id.* (quoting 435 U.S. at 861), and is a "right effectively unreviewable on appeal from a final judgment." *Id.* (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). The Tenth Circuit erroneously held that the holding in *United States v. Hollywood Motor Car Co., Inc.*, 458 U.S. 263 (1982) compels the conclusion that First Amendment defenses cannot be subject to interlocutory review and cannot be vindicated prior to trial, but "are adequately safeguarded by review after any adverse final judgment" (App., *infra*, 7B.)

The third issue involves this Court's determination of the legal standard that applies when the Constitution requires immediate pretrial judicial review of criminal proceedings. *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Younger v. Harris*, 401 U.S. 37, 53 (1971); *Oestereich v. Selective*

Service Bd., 393 U.S. 233 (1968); *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999). The Tenth Circuit erroneously failed to consider whether Petitioners, under the standards of the above cases, faced "great and immediate irreparable injury" beyond that incidental to every criminal proceeding brought lawfully and in good faith, faced a "bad faith prosecution" pursued without any expectation of securing a valid conviction, or faced a "prosecution under color of statute to harass Petitioners and discourage them and their supporters from asserting and attempting to vindicate their constitutional rights" *Reno v. American-arab Anti-discrimination Committee, supra,* 525 U.S. 471 (1999) (Ginsburg, J., concurring in part and concurring in judgment). Instead the Tenth Circuit considered none of these cases but merely concluded that all First Amendment defenses are adequately safeguarded by review after any adverse final judgment (App., *infra*, 7B.)

1. This Court has previously identified three criteria an appealing party must establish in order for the Court to have jurisdiction over an appeal from a collateral order: the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994), and *Coopers*

& Lybrand v. Livesay, 437 U.S. 463, 468 (1978). It was clear that the first two prongs of *Cohen* were not implicated in this case. The District Court had conclusively determined the disputed question by concluding that Petitioners had no right not to be tried and that question was undoubtedly an issue completely separate from the merits of the action. The Tenth Circuit then focused, in its decision, on the third prong of the *Cohen* analysis, and wrongfully concluded that Defendant's constitutional concerns did not require interlocutory review but could be adequately protected after trial. That conclusion was in error and contrary to this Court's prior holdings.

2. The manner of challenging the tax laws is regulated by 26 U.S.C. § 7422 and 26 C.F.R. § 301.6402. Individuals who have paid the tax the law purports to require may not challenge the legal basis or validity of the tax by going into court directly. They first must file a claim for refund with the Internal Revenue Service (IRS), 26 U.S.C. § 7422, and fill out the claim in accord with Treasury Regulation 26 C.F.R. § 301.6402, which states, in relevant part:

> The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of perjury. A claim which does not comply with this paragraph will not be

considered for any purpose as a claim for refund or credit.

If the procedures set out in Treasury Regulation 26 C.F.R. § 301.6402 are not followed, then a taxpayer may not proceed to court for a judicial determination of his right to a refund of any tax:

> Credits or refunds of overpayments may not be allowed or made after the expiration of the statutory period of limitation properly applicable unless, before the expiration of such period, a claim therefor has been filed by the taxpayer. Furthermore, under section 7422, a civil action for refund may not be instituted unless a claim has been filed within the properly applicable period of limitation.

26 C.F.R. § 301.6402-1(a)(1); 26 U.S.C. § 7422.

3. Such a regulatory scheme has the effect of denying to individual taxpayers the right to raise any legal issues which the IRS may deem unacceptable, unless they are willing to declare, under penalties of perjury, that their grounds for a refund, or opposition or challenges to the tax laws, are true and accurate. Consequently, a taxpayer risks criminal prosecution for the exercise of his First Amendment and Fifth Amendment rights in seeking a tax refund under any theory which the government may not like or approve in order that his way to a judicial determination may be

statutorily paved. The Tenth Circuit's conclusion that such an issue does not deserve interlocutory review is contrary to this Court's earlier holdings in *Dombrowski v.Pfister*, 380 U.S. 479 (1965), which stands for the proposition that the First Amendment may be interposed to prevent criminal prosecutions; *Cheek v. United States*, 498 U.S. 192, 206 (1991), which holds that a taxpayer may challenge the government's interpretation of the tax laws by filing for a refund and appealing a denial to the courts; and *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589, 596 (1931), which gives taxpayers the due process right to a prompt judicial determination of tax matters.

4. The wrongful utilization by the government of the statutory and regulatory scheme established by Congress and the Secretary of Treasury, effectively funnels an opponent of the government's preferred legal interpretation of the tax laws into a perjury trap for both the wary and the unwary, a sort of "killing field" wherein the government can "label" such now-perjured legal opposition or claims of invalidity, see *Cheek*, *supra*, at 206, as "false or fraudulent" claims for refund. Thus, by establishing a legal "killing field" by its regulatory scheme, the government, itself, determines which, if any, legal "grounds" or claims of invalidity it may choose to prosecute. This cannot be right. The principles espoused by this Court in *Dombrowski* and *Cheek* would be hollow in their application if taxpayers were forced to suffer the threat of, or actual, criminal prosecution for honestly seeking a

determination of their tax liabilities through a legally accepted method of administrative and judicial review.

Such a legal mine-field effectuates a denial of a right to petition one branch of government (the courts) for redress of grievance, denies judicial review of unpopular "legal" grounds (*NAACP v. Button*, 371 U.S. 415, 433 (1963) ("The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions")), effectively hedges up access to the courts for such "legal" challenges or claims of invalidity, stifles political debate and expression, and denies to a dissident minority the use of the courts as a form of political expression and outlet.

Because of the complexity of tax laws, these statutes [§§ 422, 7206(2)] and regulation [§ 301.6402] must also "be evaluated in the context of the entire regulatory scheme, rather than in isolation" in order to sense the "overall irrationality of the Government's regulatory scheme." *See Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173, 180 (1999) (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995)).

Under the application of § 7206 advanced by the government in this case and the regulatory scheme involved in claims for refund, "the opportunity given for the ultimate judicial determination of the liability is" wholly inadequate and virtually nonexistent. For "[t]he threat of sanctions may

deter . . . almost as potently as the actual application of sanctions. . . ." *NAACP v. Button*, 371 U.S. 415, 433 (1963). If this Court permits a criminal trial wherein the only charge is that Petitioners' students sought to challenge certain tax laws, as interpreted by the IRS and the courts, then this Court denies to these students and others like them any realistic "opportunity given for the ultimate judicial determination of the liability." Such a ruling allows for the deprivation of property, labeled taxes, without due process of law, and is contrary to long established precedent. A post-deprivation hearing in a tax collection matter is sufficient to meet minimum due process requirements. *Commissioner v. Shapiro*, 424 U.S. 614, 630 n.12 (1976); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 746-48 (1974). But, where, as here, an otherwise factually accurate claim becomes cause for a criminal indictment, even the "minimum due process requirements" of *Shapiro* and *Bob Jones* vanish, for the threat of criminal prosecution, in effect, denies any real opportunity for a judicial determination of an individual's tax liability.

5. Petitioners have a right not to be criminally tried for having taught compliance with a lawful method for challenging the government's interpretation of the tax law. *Cheek v. United States*, 498 U.S. 192 (1991); 26 U.S.C. § 7422. The filing of administrative claims as a jurisdictional predicate to litigation, after having paid the purported tax, was one of two lawful means afforded taxpayers for

achieving the lawful objectives of challenging the IRS's interpretation of tax law, a legal means of expressing disagreement with tax procedures by members of the patriot community, a despised and dissident minority. It was thus a form of political expression, done in strict compliance with the mechanisms established by Congress and the regulations promulgated by the Secretary of the Treasury. Groups that find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Under the conditions of modern government, litigation may be the sole practicable avenue open to a dissident and despised minority to petition for redress of grievances. See *Button*, *supra*, at 429-430.

Contrary to the government's position in this grotesque statutory and regulatory scheme, petitioners taught students they could file factually accurate claims and assert any "claim of invalidity, constitutional or otherwise," without risking criminal prosecution, in accord with the mandates enunciated in *United States v. Cheek,* 498 U.S. 192, 206 (1991). Nevertheless, rather than labeling these claims for refund as "factually accurate" but "legally frivolous," the IRS cunningly labeled them "false claims," thereby invoking the specter of dreadful prosecutions against those who dared to raise such minority legal grounds. Mere labels cannot be used to deny to individuals constitutional and statutory rights to challenge tax laws. *Button*, *supra*, at 429 ("[A] State cannot foreclose the exercise of constitutional rights by mere labels").

To the best of Petitioners' knowledge, there is no case in which individuals were prosecuted under 26 U.S.C. § 7206 for presenting minority or "frivolous" legal positions in claims for refund to the IRS which were, in all factual matters, correct. At footnote 1 of the Tenth Circuit's decision (App., *infra*, 5B), the Court admonished Petitioners "to accept the outcome" of the courts. Section 7206 has never been used to criminalize otherwise factually correct claims for refund merely because the claims of invalidity advanced therein were minority or "frivolous" legal positions. Thus, there is no "outcome" for Petitioners to accept, i.e., there is no statute, regulation or case which advises them that § 7206 can be used to criminalize legal "grounds," in claims for refund, with which the IRS and the courts disagree.

6. In *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471 L.Ed.2d 940 (1999) (Ginsburg, J., concurring in part and concurring in judgment), this Court reviewed the standards necessary for the courts to exercise interlocutory jurisdiction in state or federal cases to remedy alleged First Amendment violations with immediate effects. That review is pertinent to the"right not to be tried"issues in this case which required the court below to exercise its interlocutory jurisdiction.

Justice Ginsburg's synopsis of *Dombrowski*, *Younger* and *Oestereich v. Selective Service Bd.*, justifying immediate

intervention in ongoing cases to remedy First Amendment and other flagrant constitutional violations, leads to the conclusion that there must be present "great and immediate" irreparable injury, beyond "that incidental to every criminal proceeding brought lawfully and in good faith." *Younger, supra*, 401 U.S., at 46, 47. A chilling effect of First Amendment rights alone does not "by itself justify federal intervention." *Id.* at 50. *Younger* allowed, however, for immediate interlocutory intervention to restrain state prosecutions under "extraordinary circumstances, such as bad faith, harassing police and prosecutorial actions pursued without 'any expectation of securing valid convictions.'" *Id.* at 48. Bad faith prosecutions and harassing police conduct are "factual and evidentiary" issues, which require an initial showing by Petitioners to justify further inquiry by the courts and possible dismissal, even interlocutory, of such prosecutions. See *United States v. P.H.E.*, 965 F.2d 848 (10th Cir. 1992).

The Tenth Circuit concluded, in its opinion, that Petitioners had failed to demonstrate, at this stage, that they had been the victim of such improper behavior. *U.S. v. Ambort*, 193 F.3d 1169, 1172 (10th Cir. 1999). But, the Tenth Circuit's failure to consider the facts in this case that further justify interlocutory review effectively ignored this Court's "great and irreparable injury" and "bad faith prosecution" standards that are to apply in such a determination. *Dombrowski v. Pfister*, 380 U.S. 479 (1965);

Younger v. Harris, 401 U.S. 37, 53 (1971); *Oestereich v. Selective Service Bd.*, 393 U.S. 233 (1968); *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, (1999) Under the facts of this case, because a taxpayer is forced to face criminal prosecution, or the threat of it, by merely asserting a legal basis for a refund of taxes previously paid, and must do so in order to have access to the courts for a judicial determination of his belief, no reasonable prosecutor, under such circumstances, could expect to secure a valid conviction which would be upheld on appeal.

Regardless of how the government may characterize its prosecution, a challenge to the accepted interpretation of tax laws, even one designated as "frivolous," leaves all who issue such challenges open to criminal prosecution. Both in its brief and during oral argument in response to questions from the Tenth Circuit panel, the United States admitted its position is that no taxpayer can challenge or oppose the IRS on a point of law without risking being charged with a crime.[1]

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[1] A simple change in the claim form would permit individuals to swear to the truth of the facts presented in the form (income amount, SS number, number of dependents, etc.), while allowing them to submit their legal theories below (without) the jurat, or in some other acceptable fashion. Officers of the IRS charged with the duty of examining returns do not need legal advice from the public. It is questionable why the IRS should design a form wherein individuals are required to swear to their views of the law

The Tenth Circuit's decision denying interlocutory review, also violates due process. The Fifth Amendment requires that taxes be collected in accord with due process of law. *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589, 596; 51 S.Ct. 608, 611; 12; 75 L.Ed. 1289 (1931). Under the government's interpretation and application of §

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and risk criminal prosecution if the IRS disagrees with such a view.

Such a statutory and regulatory scheme is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it," when it involves the filing of a minority or "frivolous" challenge to existing and accepted majority interpretations of tax laws. For, when individuals, who have paid the purported tax, wish to file "factually accurate" claims with the IRS containing a minority "legal" challenges to accepted tax-law decisional authority, they are, under the statutory and regulatory scheme advanced by the government, thrust upon the horns of a dilemma. They must either suffer and comply in silence, or they must declare, under penalties of perjury, that such minority legal challenge is "true, correct, and complete," thereby subjecting themselves to criminal prosecution, all at the pleasure of the "king's officers". Such an anomaly perhaps explains why there is no case in the tax laws of the United States, prior to Petitioners' teaching efforts, in which individuals were prosecuted under 26 U.S.C. § 7206 for presenting minority or "frivolous" legal positions in claims for refund to the IRS which were, in all factual matters, otherwise correct.

7206 "the opportunity given for the ultimate judicial determination of the liability is" wholly inadequate and virtually nonexistent. For "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions. . . ." *NAACP v. Button*, 371 U.S. 415, 433 (1963). To permits a criminal trial where, despite labels, the only real charge is that Petitioners' students sought to challenge, through lawful procedures, certain tax laws, as interpreted by the IRS and the courts, then Petitioners and these students and others like them are denied any realistic "opportunity given for the ultimate judicial determination of the liability." Such a ruling would allows for the deprivation of property without due process of law, and is contrary to long established precedent. A post-deprivation hearing in a tax collection matter is necessary to meet minimum due process requirements. *Commissioner v. Shapiro*, 424 U.S. 614, 630 n.12 (1976); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 746-48, 40 L.Ed. 2d 496, 94 S.Ct. 2038 (1974). But, where, as here, an otherwise factually accurate claim becomes the basis for a criminal indictment, even the "minimum due process requirements" of *Shapiro* and *Bob Jones* vanish, for the threat of criminal prosecution, in effect, denies any real opportunity for a judicial determination of an individual's tax liability.

CONCLUSION

The Court should issue the Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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January 18, 2000

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APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiffs,

vs.

ERNEST GLENN AMBORT, JOHN W. BENSON, NONA S. EGBERT, MERRILL B. HANSEN, WILLIAM J. LEWIS, and STEVEN W. STAY, Defendants.

ORDER

CASE NO. 2:98-CR-197-B

On March 11, 1999, a hearing was held regarding Magistrate Judge Alba's January 6, 1999 report and recommendation regarding various defense motions to dismiss the indictment. Present in court on behalf of the United States was Trial Attorney Thomas C. Bradley of the Tax Division. Defendant Ernest Glenn Ambort was present, representing himself. Defendant John Benson was present, representing himself along with co-counsel Robert Booker. Defendant Nona Egbert was present representing herself. Defendant William Lewis was not present, but was represented by attorney Tom Wood. Steven Stay was present in court represented by his attorneys Max Wheeler, Richard Van Wagoner, and Heather White. Defendant Merrill B. Hansen has entered a plea of guilty and was not present, nor was his attorney Neil Kaplan.

After approximately four hours of oral argument, and consideration of the voluminous pleadings filed in connection with this motions, the Court finds that there is no legal basis for the dismissal of the indictment. Magistrate Judge Alba's report and recommendation is adopted by the Court, and the motions to dismiss are denied.

DEE BENSON, United States District Judge

N:\19856\1\APPEND A

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee
vs.
ERNEST GLENN AMBORT; JOHN W. BENSON; WILLIAM J. LEWIS; STEVEN W. STAY,
Defendants - Appellants,

and NONA S. EGBERT and MERRILL B. HANSEN,
Defendants.

No. 99-4066

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. No. 98-CR-197-B)

Ernest Glenn Ambort, pro se.

John W. Benson, pro se.

Thomas T. Wood (Todd R. Cannon with him on the brief), Wood & Associates, Salt Lake City, Utah for Defendant-Appellant William J. Lewis.

Richard A. Van Wagoner (Max D. Wheeler and Heather S. White with him on the briefs), Snow, Christensen & Martineau, Salt Lake City, Utah, for Defendant-Appellant Steven W. Stay.

Meghan S. Skelton (Alan Hechtkopf with her on the briefs), Attorneys, Tax Division, United States Department of Justice, Washington, D.C. for Plaintiff-Appellee.

Before **McKAY, KELLY,** and **MURPHY**, Circuit Judges.

KELLY, Circuit Judge.

Defendants Ambort, Benson, Lewis and Stay appeal from an order of the district court denying their motion to dismiss the indictment. The government has moved to dismiss this interlocutory appeal. In United States v. P.H.E., Inc., 965 F.2d 848, 856 (10th Cir. 1992), we held that an interlocutory order in a criminal case that implicates a defendant's First Amendment "right not to be tried" may be immediately appealable, regardless of the lack of a final order, see U.S.C. § 1291. Whether this appeal fits within either that exception or within the collateral order exception to the final judgment

rule must be decided prior to evaluating the merits. We dismiss the appeal for lack of jurisdiction.

Background

Defendants were indicted by a grand jury on one count of conspiracy to defraud the United States by assisting in the preparation of false tax returns, in violation of 18 U.S.C. § 371, and on seventy counts of aiding and assisting in the filing of false tax returns, in violation of 26 U.S.C. § 7206(2). The conspiracy count alleges that Defendants operated an organization known as "Association de Libertas" (ADL) that conducted "constitutional history seminars" throughout the United States. It further alleges that ADL leaders falsely told the seminar attendees that they were "nonresident aliens" exempt from most federal income taxes. For a fee of $1,500 to $1,600 for "forms training," ADL instructors taught the attendees how to complete an amended return form (Form 1040X) and/or a nonresident alien income tax return (Form 1040NR), falsely claiming a refund for past years' taxes. In addition to the above fee, ADL also required one-third of any refund. To ensure payment, the mailing address of an ADL instructor or "escrow agent" appeared on the amended returns. The false return counts allege that the Defendants assisted in preparation of tax returns that were false and fraudulent as to a material matter, specifically classifying the taxpayers as nonresident aliens when the taxpayers were in fact residents of the United States subject to taxation and not entitled to the refunds claimed.

Defendants filed motions to dismiss the indictment on various grounds. In pertinent part, Defendants argued that under 26 U.S.C. §7422 and Cheek v. United States, 498 U.S. 192 (1991), they have a right not to be tried for violation of

tax laws when they simply urged compliance with a lawful method for challenging the government's interpretation of the tax laws. The district court was not persuaded.

Discussion

Ordinarily, the court of appeals' jurisdiction in criminal matters like this one is limited to appeals from final judgments. See 28 U.S.C. § 1291. However, the Supreme Court has created a single departure from this rule in the "limited category of cases falling within the 'collateral order' exception delineated in Cohen. . . ." United States v. Hollywood Motor Car Co., 458 U.S. 263, 265 (1982) (referring to Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-47 (1949)). In order to satisfy the Cohen exception, three requirements must be met: "the order must exclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). This limited exception is applied "with the utmost strictness in criminal cases." Flanagan v. United States, 465 U.S. 259, 265 (1984).

Relying upon the First Amendment's right to petition for redress of grievances, Defendants argue that their "right not to be tried" merits review under the collateral order exception. Defendants have the burden of establishing the legal and factual basis for such a right. As the Supreme court has noted, "§ 1291 requires courts of appeals to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 873 (1994).

> A right not to be tried in the sense relevant to the Cohen exception rests upon an explicit statutory or constitutional guarantee that trial will not occur--as in the Double Jeopardy Clause ('nor shall any person be subject for the same offence to be twice put in jeopardy õf life or limb') or the Speech or Debate Clause ('[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place').

Midland Asphalt Corp. v. United States, 489 U.S. 794, 801 (1989). Nowhere in the Constitution or laws of the United States is there an "explicit statutory or constitutional guarantee" of a right not to be tried for ordinary speech, even if otherwise protected by the First Amendment.[1]

This analysis "reflects the crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges. The former necessarily falls into the category of rights that can be enjoyed only if vindicated prior

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[1] Defendants make much of the language in Cheek v. United States that a taxpayer may challenge the government's interpretation of the tax laws by filing for a refund and appealing a denial to the courts. See Cheek, 498 U.S. at 206. An important qualification, made throughout the passage, however, is that a taxpayer also must be willing "to accept the outcome." Id.; see also United States v. Willie, 941 F.2d 1384, 1391-92 (10th Cir. 1991) (discussing parameters of good faith belief as a defense to willfulness and explaining that mere disagreement with a known legal duty is not a defense). Regardless, Cheek simply does not address any right to enlist and prepare returns on behalf of others, as alleged in this case.

to trial. The latter does not." Hollywood Motor Car Co., 458 U.S. at 269 (citation omitted). Accordingly, First Amendment defenses like those asserted here are adequately safeguarded by review after any adverse final judgment. See, e.g., United States v. Knapp, 25 F.3d 451, 457 (7th Cir. 1994); United States v. Kuball, 976 F.2d 529, 531-32 (9th Cir. 1992); United States v. Citrowske, 951 F.2d 899, 900-01 (8th Cir. 1991).

Defendants analogize their situation to the "unusual, perhaps unique confluence of factors" present in United States v. P.H.E., 965 F.2d at 855. P.H.E. is distinguishable. In that case, federal prosecutors engaged in a nationwide campaign against pornography. The P.H.E. holding rests upon a finding that this campaign was "designed to use the burden of repeated criminal prosecutions to chill the exercise of First Amendment rights." Id. at 855. A review of the record confirms that, at this stage, Defendants have made no such showing. Cf. Pleasant v. Lovell, 974 F.2d 1222, 1233 (10th Cir. 1992) (no evidence "that [governmental] defendants' motive was to harass or disrupt the NCBA in any legal political pursuits"). Thus, no factual predicate exists for the invocation of P.H.E.

Reliance upon Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984), is also unavailing. Bender involved an appeal from a district court's order remanding a case to an administrative agency. The court decided that the order was neither a final judgment nor collateral, but that principles of justice mandated prompt review. "[I]n the unique instance where the issue is not 'collateral' but justice may require immediate review, a balancing approach should be followed to make this jurisdictional decision." Id. at 1427. In this case, immediate review is unnecessary since the rights contended

for are adequately protected by appeal after any adverse final judgment.

APPEAL DISMISSED.

N:\19856\1\APPEND B

APPENDIX C

No. 99-4066

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee

vs.

ERNEST GLENN AMBORT, JOHN W. BENSON,
WILLIAM J. LEWIS, STEVEN W. STAY,
Defendants - Appellants,

NONA S. EGBERT, MERRILL B. HANSON,
Defendants.

ORAL ARGUMENT IS REQUESTED

ON APPEAL FROM THE JUDGMENTS
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

BRIEF FOR THE APPELLEE

STATEMENT OF JURISDICTION

Defendants, Ernest Glenn Ambort, John W. Benson, William J. Lewis, and Steven W. Stay, moved to dismiss an indictment filed in the United States District Court for the District of Utah (Honorable Dee Benson, presiding). Defendants appeal the denial of their motions by the District Court. The District Court had jurisdiction over this case under 18 U.S.C. 3231. Defendants filed a joint notice of appeal on March 24, 1999. (R. 260.)[1] However, the order from which defendants appealed was not a final order and, as demonstrated further below, this Court lacks jurisdiction.

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction to hear this interlocutory appeal.

2. Whether the First Amendment, the Internal Revenue Code, or case law gave defendants a right to instruct taxpayers that the taxpayers could, with impunity, file claims for refunds of taxes paid, in which the taxpayers falsely asserted that they were non-resident aliens and that they had no taxable income, and whether the District Court erred in rejecting defendants' contention that false statements in the claims at issue were not material and that the indictment therefore should be dismissed.

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[1] "R." references are to documents in the Clerk's record, as numbered by the Clerk of the District Court. "A. Br." references are to the brief on behalf of Glenn Ambort and John Benson. "L. Br." references are to William Lewis's brief. "S. Br." references are to Steven Stay's brief. "Tr." references, preceded by a date, are to the reporter's transcripts of pretrial hearings.

STATEMENT OF THE CASE

1. Course of proceedings and disposition in the court below

A grand jury in the District of Utah indicted defendants, Ernest Glenn Ambort, John W. Benson, Nona S. Egbert, Merrill B. Hanson, William J. Lewis, and Steven W. Stay, on April 15, 1998. (R. 1.) The indictment charged defendants with one count of conspiracy to defraud the United States and to commit offenses against the United States, in violation of 18 U.S.C. 371, and sixty-eight counts of aiding and assisting in the preparation and presentation to the Internal Revenue Service (IRS) of false and fraudulent federal income tax returns, in violation of 26 U.S.C. 7206(2).

In September 1998, defendants filed motions to dismiss the indictment. (R. 127, 129, 130, 131, 132, 136.) They asserted (1) that the indictment was insufficient (R. 185 at 12, 25), (2) that the District Court did not have jurisdiction over Title 26 offenses (R. 185 at 11), (3) that their First Amendment rights were violated (R. 185 at 26), (4) that there was no evidence demonstrating willfulness (R. 185 at 29), and (5) that there was no evidence of a conspiracy (R. 185 at 29). The motions were referred to a magistrate judge.

On January 6, 1999, the magistrate recommended that defendants' motions be denied. (R. 185, 193.) He rejected defendants' challenge to the sufficiency of the indictment, finding that the indictment sufficiently gave notice of the charges, contained the elements of the crimes charged, and allowed a double jeopardy defense. (R. 185 at 25.) The magistrate also rejected defendants' challenge to the District Court's jurisdiction over Title 26 offenses. The magistrate also found that defendants' remaining arguments, such as

arguments that they lacked willfulness and were acting in good faith, were factual defenses to the charges and were therefore not grounds upon which to grant a motion to dismiss an indictment. (R. 185 at 25-26, 31-32, 28-29, 74.) Defendants filed with the District Court objections to the magistrate's recommendation to deny the motions. After holding a second hearing, the District Court denied the motions, adopting the Magistrate's report and recommendation. (R. 251, 256.)

Defendants filed a joint notice of appeal from the order denying the motions to dismiss the indictment. The Government then filed a motion to dismiss the appeal for lack of jurisdiction. At nearly the same time, on April 20, 1999, this Court sent a letter to all parties stating that it was considering summary dismissal for lack of jurisdiction and requested memorandum briefing on jurisdiction. On June 17, 1999, this Court issued an order reserving judgment on jurisdiction and ruling that briefing on the merits would proceed.

2. Statement of facts

Defendants, Ernest Glenn Ambort, John W. Benson, Nona S. Egbert, Merrill B. Hanson, William J. Lewis, and Steven W. Stay, were charged with one count of conspiracy to defraud the United States and to commit offenses against

the United States, and with aiding and assisting in the preparation of fraudulent tax returns. The indictment alleged that defendants owned and operated an organization called Association de Libertas (ADL), which conducted "constitutional history seminars" throughout the United States. (R. 1.) At the seminars, defendants instructed that the attendees were non-resident aliens and exempt from United States income taxes, although defendants really knew that the attendees were not nonresident aliens and were subject to the income tax laws. The attendees would then pay a fee of $1,500 to $1,600 to attend "forms training," during which ADL instructors showed them how to complete Amended Individual Income Tax Returns (Forms 1040X) and Nonresident Alien Income Tax Returns (Forms 1040NR). These returns, if completed according to ADL instruction, made false claims for refunds of taxes paid during previous tax years. (R. 1.) ADL required the attendees to use its own post office box as the taxpayer address on the returns, so that the IRS would mail any refunds to ADL rather than the taxpayer directly. According to ADL's plan, it would take a commission of one-third of each refund, and the taxpayer would keep the remaining two-thirds. (R. 1.)

SUMMARY OF ARGUMENT

1. This Court does not have jurisdiction to hear this appeal. The order denying the motions to dismiss the indictment was not a final order, and nothing brings the order into the purview of the collateral order doctrine. It does not conclusively resolve the disputed issue and it is inextricably intertwined with the merits of the case. In addition, defendants can receive adequate review of their claims after conviction. Contrary to defendants' arguments, there is no right not to be tried in this case.

2. The District Court correctly denied the motions to dismiss the indictment. The First Amendment right to petition for redress of grievances does not protect the filing of fraudulent or frivolous claims against the United States, because such claims are, by definition, not bona fide grievances. The right to petition for redress likewise does not protect the filing of false returns. Contrary to defendants' arguments, Cheek v. United States, 489 U.S. 192 (1992), does not create a "safe harbor" in which an individual may file false returns under the guise of litigating a frivolous legal theory. Nonetheless, each defendant is free to put on evidence at trial that he or she had a good faith belief that the returns at issue were legally permissible.

The District Court also correctly denied defendants' challenge to the materiality of those false returns. The making of a misstatement as to a material matter on a tax return is an element of 26 U.S.C. 7206(2). A matter is material if a statement with respect to it has a tendency to influence, or is capable of influencing, the decision-making body to which it is addressed. More particularly, with respect to tax returns, matters relating to the calculation of tax are material. Such matters include citizenship, residency, and income -- to which the statements at issue in this case pertained: income of course enters into the calculation of tax liability, and the taxability of income depends on, inter alia, residency and alienage. Therefore, a jury could reasonably find that the misstatements on the false returns in this case were material.

Defendants contend, however, that the false statements in the returns were actually statements of legal theories, rather than factual assertions, and that the returns fully disclosed all material facts truthfully. But, in general, when deciding a motion to dismiss, a district court may consider only facts

alleged in the indictment, and the indictment here did not allege that the false statements in question were other than factual assertions or that the returns fully disclosed all material facts. Moreover, defendants' argument that the false statements were only asserting legal theories is unavailing. Section 7206(2) makes it a crime to assist in the filing of a return containing a false statement as to a material "matter," not just a material fact. Thus, even if the district court had concluded that the false statements, which appeared to be false statements of fact, were assertions of legal theories, the court could not have found on the basis of allegations in the indictment that the statements were not capable of influencing IRS decision making. Accordingly, dismissal of the indictment would have been inappropriate.

ARGUMENT

I

THIS COURT LACKS JURISDICTION OVER THIS INTERLOCUTORY APPEAL BECAUSE NO EXCEPTION TO THE FINAL ORDER RULE IS APPLICABLE IN THIS CASE

Standard of Review

This Court reviews jurisdictional issues de novo as a question of law. United States v. Perez-Herrera, 86 F.3d 161, 163 (10th Cir. 1996); United States v. Maher, 919 F.2d 1482, 1485 (10th Cir. 1990).

Argument

Contrary to defendants' assertion (S. Br. 1; L. Br. 21-25; A. Br. 7), the order from which defendants seek to appeal --

the denial of a motion to dismiss the indictment -- is not immediately appealable. Therefore, this Court lacks jurisdiction, and the appeal should be dismissed.

To be appealable, an order must fall within the purview of 28 U.S.C. 1291, which limits appellate jurisdiction to "final decisions" of the district courts, see Flanagan v. United States, 465 U.S. 259, 263-265 (1983); Cobbledick v. United States, 309 U.S. 323, 324 (1940) ("[f]inality as a condition of review is an historic characteristic of federal appellate procedure"), or 28 U.S.C. 1292, which confers upon the courts of appeals jurisdiction over certain interlocutory decisions. In this case, the order from which defendants seek to appeal is not immediately appealable under either Section 1291 or Section 1292.

A. Jurisdiction does not lie under 28 U.S.C. 1291

The finality requirement under Section 1291 "embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals." United States v. Nixon, 418 U.S. 683, 690 (1974); Cobbledick v. United States, 309 U.S. at 327-328. That policy "is at its strongest in the field of criminal law." United States v. Hollywood Motor Car Co., 458 U.S. 263, 265 (1982); see also DiBella v. United States, 369 U.S. 121, 126 (1962) (same).

To constitute a final decision, an order must end the litigation on the merits and leave nothing for the court to do but execute the judgment. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978). A final judgment in a criminal case is one in which there has been both a conviction and the imposition of sentence. Midland Asphalt Corp. v. United States, 489 U.S. 794, 798 (1989); United

States v. Ritter, 587 F.2d 41, 42 (10th Cir. 1978). Here, since defendants have not even been tried, let alone convicted and sentenced, the order from which they seek to appeal plainly is not a final judgment. See Midland Asphalt, 489 U.S. at 798.

The Supreme Court has allowed departures from the finality rule for a "limited category of cases falling within the 'collateral order' exception delineated in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-547 (1949)." Hollywood Motor Car Co., 458 U.S. at 265. To fall within this exception, an order must satisfy three criteria: it "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." Coopers & Lybrand, 437 U.S. at 468; United States v. Thompson, 814 F.2d 1472, 1476 (10th Cir. 1987). The Supreme Court has applied this three-part test "with the utmost strictness" in criminal cases. Flanagan, 465 U.S. at 265.

The Supreme Court has found only three types of pretrial orders in criminal cases to meet the "collateral order" requirements: an order denying a motion to reduce bail (Stack v. Boyle, 342 U.S. 1 (1951)); an order denying a motion to dismiss an indictment on double jeopardy grounds (Abney v. United States, 431 U.S. 651 (1977)); and an order denying a motion to dismiss based upon an assertion of immunity under the Speech or Debate Clause (Helstoski v. Meanor, 442 U.S. 500 (1979)). See Midland Asphalt Corp. v. United States, 489 U.S. at 799-801. The order denying defendants' motions to dismiss is not within these three categories of orders, and it does not otherwise satisfy the three criteria necessary to bring an order within the collateral order exception.

Defendants' motions were based in part on the theory, which they argue here (S. Br. 9-15; L. Br. 16-20; A. Br. 11-22), that the false tax returns they aided and assisted in filing were petitions for redress of grievances, protected by the First Amendment. According to defendants, under the First Amendment right to petition for redress of grievances and procedures established by the internal revenue laws, their "students" were entitled to file returns based on the legal theory that the "students" were non-resident aliens and were entitled to refunds of the taxes the "students" had paid. Defendants argue that it was not a crime for them to teach the taxpayers to file the returns. (A. Br. 20, 31-32; S. Br. 14-15.) Defendants also based their motions on the proposition, which they continue to assert (S. Br. 14-15; L. Br. 15-20; A. Br. 25-27, 29-32, 37-39), that the false statements on the returns were merely legal argument rather than false statements of material facts, and that the alleged lack of materiality requires dismissal of the indictment.

These arguments are all related to the merits of the case against defendants. Since materiality is an element of a violation of 26 U.S.C. 7206(2), see United States v. Aramony, 88 F.3d 1369, 1382, 1384 (4th Cir. 1996), it is obvious that defendants' contention that the false statements on the returns at issue were not material is directly related to the merits of this case.

Also related to the merits is defendants' assertion that it was permissible to file the false returns at issue. One of the elements of a violation of 26 U.S.C. 7206(2) and of conspiracy to commit that offense is willfulness. See United States v. Montgomery, 150 F.3d 983, 1001 (9th Cir.), cert. denied, 119 S. Ct. 460 (1998). An element of conspiracy to defraud is intent to defraud. United States v. Furkin, 119 F.3d 1276, 1279 (7th Cir. 1997). To establish willfulness, the

government must "prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." Cheek v. United States, 498 U.S. 192, 201 (1991). Acting with intent to defraud means acting with a purpose to deceive or cheat. United States v. Gray, 105 F.3d 956, 968 (5th Cir.), cert. denied, 520 U.S. 1150 (1997). Defendants' assertion that filing of the false returns was permitted by the First Amendment and the tax laws relates to willfulness and intent to defraud. The assertion directly concerns the existence of a duty not to file the returns at issue; and at trial, defendants will be able to raise a good faith defense and require the government to prove that they did not actually believe in good faith that the filing of the returns at issue was permitted by law. Cheek v. United States, 498 U.S. at 201. As the District Court found, defendants' arguments to support their motions to dismiss were simply "in the form of a closing argument to the jury." (3/11/99 Tr. 30.) Thus, the order at issue fails to satisfy the second prong of the Coopers & Lybrand test.

The order also fails to satisfy the first prong. Since the issues on which the motions to dismiss were based are intertwined with the merits of the case, it cannot be said with certainty that the District Court conclusively resolved the issues. The court's resolution of the issues could well change as evidence is developed during a trial or as new arguments are presented during trial.

Finally, defendants could raise their arguments and receive effective relief on appeal from a final conviction. Defendants contend (S. Br. 9-15; L. Br. 16-20; A. Br. 11-22, 40) that this case involves rights not to be tried under the First and Fifth Amendments and 26 U.S.C. 7422. However, while deprivation of a right not to be tried would satisfy the

third prong of the Coopers & Lybrand test (i.e., that the order from which a party seeks to appeal is "effectively unreviewable on appeal from a final judgment"), "[a] right not to be tried in the sense relevant to the Cohen exception rests upon an explicit statutory or constitutional guarantee that trial will not occur -- as in the Double Jeopardy Clause ('nor shall any person be subject for the offense to be twice put in jeopardy of life or limb'), or the Speech or Debate Clause ('[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place')." Midland Asphalt, 489 U.S. at 800-01 (citations omitted). The right to petition the government for redress of grievances, on which defendants rely (S. Br. 9-13; L. Br. 19-20; A. Br. 8-37) does not include a specific right not to be tried.[2] And defendants have not identified any such guarantee applicable to them elsewhere in the First Amendment, or in the Fifth Amendment (they do not invoke the Double Jeopardy Clause) or 26 U.S.C. 7422.[3] Thus, defendants have failed to show that the order from which they seek to appeal would be unreviewable after a judgment of conviction.

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[2] The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I.

[3] Title 26 U.S.C. 7422 relates to civil actions for refund. The statute does not state or imply that a taxpayer may, with impunity, willfully file a false claim for a refund, nor does it have any language that may be construed as giving rise to a right not to be tried if conduct charged to be criminal ultimately may be held to be authorized by the statute.

This Court's decision in United States v. P.H.E., Inc., 965 F.2d 848 (10th Cir. 1992), does not require a different result. In that case, several United States Attorneys from around the country planned to simultaneously investigate and prosecute the defendant, P.H.E., a purveyor of pornography, with the intent to bankrupt the company with the cost of defending multiple prosecutions and put it out of business. Id. at 850-53, 857. A grand jury in Utah indicted P.H.E., and the company moved to dismiss the indictment, arguing that the prosecution was in bad faith. 965 F.2d at 852. The district court denied the motion, and this Court held that it had jurisdiction to review the district court's denial of the motion. In so holding, this Court identified the controlling issue narrowly, as whether a "First Amendment right to be free from pretextual criminal prosecutions, brought not by a desire to enforce the law, but by a desire to pressure a defendant into surrendering First Amendment rights, can be vitiated by requiring a defendant to await post-trial vindication." Id. at 854. This Court concluded that the case presented "an unusual, perhaps unique confluence of factors," such as "substantial evidence of an extensive government campaign . . . designed to use the burden of repeated criminal prosecutions to chill the exercise of First Amendment rights." Id. at 855. The Court also noted that the defendants had adduced substantial evidence that the prosecutors specifically intended to coerce the defendants into surrendering their First Amendment rights. See id. at 857. The Court held that this unique set of circumstances was sufficient to satisfy the third prong of the Coopers & Lybrand test. Id. at 855.

The Court also held, 965 F.2d at 857, that "in the context of an uncontroverted, coordinated campaign of questionable prosecutorial activity," the priority of the First Amendment rights asserted supported appellate jurisdiction under the

teachings in Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984). The P.H.E. Court noted that, in Bender, it had

> recognized that instances arise "where the issue is not 'collateral' but justice may require immediate review," and the court should assert jurisdiction if "the danger of injustice by delaying appellate review outweighs the inconvenience and costs of piecemeal review."

P.H.E., 965 F.2d at 857.

None of the factors used by this Court to find appealability in P.H.E. exist in this case. Defendants have adduced no evidence that the government harbored any improper motives or acted improperly in instituting the instant prosecution. Although defendants Ambort and Benson speculate (A. Br. 32-37) on possible government motives, mere speculation is insufficient to establish that the government intended to chill First Amendment rights; instead, this Court requires a defendant to make a showing of actual vindictiveness or a realistic likelihood of improper government motives. P.H.E., 965 F.2d at 860 (quoting United States v. Raymer, 941 F.2d 1031, 1040 (10th Cir. 1991)). In addition, as discussed further below, defendants have not raised a substantial First Amendment claim: taxpayers simply have no First Amendment right to disrupt the self-assessment system of income taxation by willfully filing false returns claiming refunds. Thus, P.H.E. does not support a finding of appealability in this case.

Nor does Dombrowski v. Pfister, 380 U.S. 479, 487 (1965), on which defendants rely (S. Br. 8; L. Br. 17-18, 24; A. Br. 43). In Dombrowski, the complainants sought, in federal court, declaratory relief and an injunction restraining

certain state officials, including the police and law enforcement officers, from prosecuting or threatening to prosecute the complainants for alleged violations of the Louisiana Subversive Activities and Communist Control Law and the Communist Propaganda Control Law. 380 U.S. at 481-82. The Supreme Court decided that a three-judge district court had erred in abstaining from deciding the case. The Supreme Court held that "the abstention doctrine is inappropriate for cases such as the present one where . . . statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities." 380 U.S. at 489-90. This holding does not suggest that jurisdiction lies in the instant case: unlike the statutes at issue in Dombrowski, 26 U.S.C. 7206(2) and 18 U.S.C. 371 do not broadly abridge the exercise of free speech or other rights protected by the First Amendment, and, as already discussed, there is no evidence that the instant prosecution was brought to discourage protected activity. Indeed, as discussed further below, the filing of false claims for tax refunds is not protected conduct.

Thus, the order at issue is not appealable under 28 U.S.C. 1291.

B. Jurisdiction does not lie under 28 U.S.C. 1292

The order also is not appealable under 28 U.S.C. 1292. Orders of the type from which defendants attempt to appeal are not among the interlocutory orders listed in Section 1292(a). Those orders include interlocutory orders granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions; interlocutory orders relating to receiverships; and interlocutory decrees determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are

allowed. Section 1292(b) is likewise inapplicable to this case because it applies only to civil actions, while the present case is a criminal action. Moreover, for an order to be appealable under Section 1292(b), the district judge must state in the order that he is of the opinion that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." The judge made no such statement in the order at issue here, and instead stated that the defendants' arguments constituted factual defenses. (3/11/99 Tr. 116.) Thus, Section 1292 does not confer jurisdiction over the instant appeal.

Therefore, this court is without jurisdiction to hear the appeal, and it should be dismissed.

II

THE DISTRICT COURT DID NOT ERR IN DENYING DEFENDANTS' MOTIONS TO DISMISS THE INDICTMENT

Standard of Review

Defendants raise questions of law. This Court reviews questions of law de novo. United States v. Alvarez, 142 F.3d 1243, 1246 (10th Cir.), cert. denied, 119 S. Ct. 242 (1998).

Argument

If this Court determines that it has jurisdiction over the instant appeal, the District Court's denial of defendants' motions to dismiss the indictment should be affirmed, because defendants' challenges to the indictment are

frivolous. Defendants contend (A. Br. 43-44; L. Br. 15, S. Br. 7-13) that they have a right not to be tried for instructing attendees at seminars that the attendees could file claims for refunds of taxes paid, in which the taxpayers correctly or incorrectly asserted that they were non-resident aliens and that they had no taxable income. Defendants assert (S. Br. 9-13; L. Br. 15-20) that their teaching was in accord with the First Amendment right to petition for redress of grievances, Sections 6213 and 7422 of the Internal Revenue Code, and the decision of the Supreme Court in Cheek v. United States, 489 U.S. at 206. Defendants also contend (S. Br. 14-15; L. Br. 15-16, 18; A. Br. 41-45) that, as a matter of law, the false statements alleged in the indictment were not material. Defendants characterize the statements as "legal conclusions," and assert that the returns in question disclosed all factual information accurately. (A. Br. 39, L. Br. 18.) The District Court properly rejected these contentions.

A. Taxpayers are not entitled to file claims that they know to be baseless

Neither the First Amendment, the Internal Revenue Code, nor the Cheek decision authorizes a taxpayer to file with impunity a claim he knows to be based on false information or a frivolous interpretation of the law. In Bill Johnson's Restaurant, Inc. v. National Labor Relations Board, 461 U.S. 731, 743 (1983), the Supreme Court held that "baseless litigation is not immunized by the First Amendment right to petition." As the Court pointed out, litigation based on frivolous and meritless claims "by definition does not involve a bona fide grievance" and therefore "does not come within the first amendment right to petition."

In addition, courts of appeals have rejected the proposition that the filing of false returns is protected by the

right to petition. In United States v. Citrowske, 951 F.2d 899, 901 (8th Cir. 1991) the court held, "Although a defendant's reason for making a false statement may be relevant to the jury's deliberations, the desire to redress grievances or protest for change does not necessarily exclude a finding of a criminal violation." Similarly, in United States v. Kuball, 976 F.2d 529, 532 (9th Cir. 1992), the court held that "[t]he First Amendment does not protect Kuball merely because he characterized his filing of false information and tax returns as petitions for redress. See also Franklet v. United States, 578 F. Supp. 1552, 1556 (N.D. Cal. 1984) (frivolous return penalty under 26 U.S.C. 6702 does not impermissibly restrict right to petition for redress of grievances), aff'd, 761 F.2d 529 Cc: (9th Cir. 1985). Thus, defendants' reliance on the First Amendment is misplaced.

Internal Revenue Code Sections 7422 and 6213 likewise are of no avail to defendants. Section 7422 provides for civil actions for refund, and Section 6213 provides for Tax Court petitions challenging IRS determinations of tax deficiencies. Neither statute states or implies that a taxpayer is entitled to knowingly assert a false or frivolous position.

Nor does Cheek v. United States, 498 U.S. at 206. Although the Supreme Court noted, in the discussion on which defendants rely, that Cheek could have utilized Internal Revenue Code procedures to present claims of invalidity of the tax laws to the courts, the Supreme Court did not state that those procedures permit a taxpayer to present a claim he knows to be false or frivolous. Moreover, it is clear from the context of the Court's discussion, that the Court was referring to claims Cheek actually believed to be valid. Immediately preceding the discussion, the Court stated that Cheek had "concluded that the income tax laws could not constitutionally require him to pay a tax." 498 U.S. at 206.

Thus, Cheek does not, as defendants contend (S. Br. 11-12; L. Br. 6-8; A. Br. 28-29), create a "safe harbor" for false or frivolous refund claims.

The absence of a right to file false or frivolous refund claims with impunity does not, as defendants contend (S. Br. 12-13; L. Br. 9), mean that taxpayers cannot safely test the IRS's position with respect to a point of tax law. A taxpayer who genuinely believes in good faith that his interpretation of the tax law is correct will be able to assert his good faith belief as a defense if a prosecution results. See Cheek, 498 U.S. at 201-04.

In sum, a taxpayer does not have a right under the First Amendment, the Internal Revenue Code, or case law to knowingly file false claims for refund to test the IRS's or the courts' interpretation of the tax laws. The District Court properly rejected defendants' assertions to the contrary.

B. The District Court did not err in rejecting defendants' challenge to the materiality of the false statements in the tax returns at issue

Under 26 U.S.C. 7206(2), a false or fraudulent statement must relate to a material matter. United States v. Aramony, 88 F.3d 1369, 1382, 1384 (4th Cir. 1996). A statement is material if it has "a natural tendency to influence, or [is] capable of influencing, the decision-making body to which it was addressed." United States v. Gaudin, 515 U.S. 506, 509 (1995); see also United States v. Steele, 896 F.2d 998, 1006 (6th Cir. 1990), rev'd on other grounds, 933 F.2d 1313 (6th Cir. 1991) (en banc). A material statement has also been more particularly defined as one that affects the calculation of tax due and owing. United States v. Winchell, 129 F.3d

1093, 1098 (10th Cir. 1997); United States v. Clifton, 127 F.3d 969, 970-71 (10th Cir. 1997).[4]

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[4] Defendant Ambort takes issue (A. Br. 25-27) with the first definition of materiality and accuses the government of engaging in misrepresentation by referring to it below with a citation to United States v. Winchell, 129 F.3d 1093, 1098 (10th Cir. 1997). Ambort's objection is baseless. In Winchell, the Court noted that it had recently stated that

> information is material under § 7206(1) if it is "necessary 'in order that the taxpayer . . . compute his tax correctly.'"

Winchell, 129 F.3d at 1098 (quoting "United States v. Clifton, 127 F.3d 969, 970 (10th Cir. 1997) (quoting United States v. Strand, 617 F.2d 571, 574 (10th Cir. 1980)). The Court also noted, 129 F.3d at 1098 n.11, that it had used the challenged definition "in the analogous context of 18 U.S.C. § 1001, which prohibits the knowing and willful making of a false statement regarding a material fact that is within the jurisdiction of a federal agency." The Court did not in any way indicate that this definition is inapplicable to 26 U.S.C. 7206; indeed, its reference to 18 U.S.C. 1001 as an "analogous context" suggests that the definition is applicable to the tax statute. Moreover, the challenged definition was used with respect to Section 7206 in United States v. Steele, 896 F.2d at 1006. And in United States v. DiVarco, 484 F.2d 670, 673 (7th Cir. 1973), the court indicated that material matters under Section 7206 are not limited to items included in a tax calculation -- the court held that a misstatement as to the source of income is a material matter. Given that Steele and DiVarco were decided before the criminal conduct alleged in the indictment in this case, there is no merit to Ambort's contention (A. Br. 27) that application of the

A statement that a taxpayer is a nonresident alien may influence a tax calculation: citizens and resident aliens are taxable on all income, regardless of source, while nonresident aliens are taxable only on income effectively connected with trade or business in the United States; in addition, nonresident aliens are taxed at a flat rate of 30%, while a schedule of differing rates applies to citizens and resident aliens. See Sayre & Company v. Riddell, 395 F.2d 407, 411 (9th Cir. 1968); 26 U.S.C. 871(a). Thus, a fact finder may reasonably find that a statement regarding alienage relates to a material matter.

Defendants argue (S. Br. 15; L. Br. 15-20; A. Br. 25-27, 29-32), however, that the statements on the returns at issue were merely statements of legal conclusions accompanied by full disclosure of all material facts and therefore were not material. But, in general, the sufficiency of an indictment must be tested solely on the basis of the allegations made on its face, United States v. Hall, 20 F.3d 1084, 1087 (10th Cir. 1994); and the face of the indictment here does not allege that the tax returns claiming refunds made full disclosure of facts pertinent to the tax status or taxable income of the taxpayers or that the returns indicated that the taxpayers were asserting legal conclusions rather than facts. Defendant Stay claimed in an affidavit (R. 125) that he had stated on returns that his submissions were based on his understanding of the Internal Revenue Code and had requested the IRS to notify him if he was wrong, and that he had advised taxpayers to include similar statements and requests with their refund claims. But his assertion is not uncontested and merely raises a question for the finder of fact at trial. See Hall, 20 F.3d at 1088 (court may consider facts outside face of indictment

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challenged definition would violate the Ex Post Facto Clause of the Constitution.

"under the limited circumstances where the operative facts are undisputed and the government fails to object to the district court's consideration of those undisputed facts in making the determination regarding a submissible case.") Thus, the District Court had no basis for finding that the false claims were merely assertions of legal theories and no reason to find that the false statements were not material.

Furthermore, even if the false statements were construed as legal conclusions rather than assertions of fact, there still would be no basis for a determination that the statements were not material. Section 7206(2) refers to falsity as to a material "matter," not a material "fact." A determination whether the IRS would be influenced by the statements in its decision making would depend on facts that were not before the District Court and would have to be developed at trial. Thus, the District Court did not err in rejecting defendants' challenge to the materiality of the statements at issue.

Accordingly, the District Court did not err in denying defendants' motions to dismiss the indictment.

STATEMENT REGARDING ORAL ARGUMENT

This Court has already scheduled oral argument for this case on September 24, 1999. Counsel for the Government believes that oral argument would be helpful in this case because it would enable us to answer any questions the Court may have.

CONCLUSION

For the foregoing reasons, it is respectfully requested that defendants' interlocutory appeal be dismissed or, if the

appeal is not dismissed, that the order of the District Court be affirmed.

Respectfully submitted,

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